Panjalingam a/l TK Pillay v Bank Pembangunan Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-712–11 OF 2024
ARZIAH MOHAMED APANDI JC
28 MAY 2025

Civil Procedure — Striking out — Application for — Plain and obvious test — Bank obtained judgment against plaintiff as guarantor of financing facility — Funds obtained via public auction of charged property insufficient to satisfy judgment debt — Bank commenced bankruptcy proceedings against plaintiff as guarantor — Plaintiff filed action against bank for declarations that bankruptcy proceedings were illegal and that he was wholly discharged as guarantor — Bank filed application to strike out plaintiff's statement of claim — Whether plaintiff was guarantor or primary obligor — Whether ss 92 and 94 of Contracts Act 1950 applicable to plaintiff's circumstances — Whether plaintiff's suit barred by res judicata and issue estoppel — Whether plaintiff's suit time-barred — Whether plaintiff's suit abuse of process — Whether plaintiff's claims would still fail on substantive merits — Whether 'plain and obvious' test for striking out was satisfied — Contracts Act 1950 ss 92 & 94 — Limitation Act 1953 s 6 — Rules of Court 2012 O 18 r 19(1)(b), (c) & (d)

Bank Pembangunan Malaysia Bhd ('the defendant') had granted a financing facility amounted to RM63m to MHES Asia Sdn Bhd ('MASB') for the purpose of financing a renewable energy biomass facility. The financing facility was secured, inter alia, by guarantee given by the plaintiff via an irrevocable joint and several guarantee agreement dated 28 November 2008 ('the IJSG agreement'). When MASB defaulted in payment of the financing facility, the defendant filed an action in 2016 against the plaintiff as the guarantor. At the end of the case, judgment was entered in favour of the defendant and the plaintiff was ordered to pay the sum of RM3,777,520.58 (together with interest and costs) to the defendant ('the 2016 judgment'). Following the 2016 judgment, the defendant had made several attempts to sell the charged property via public auction, all of which failed until the eventual sale in March 2023. However, the funds gathered from the sale of the charged property were insufficient to satisfy the judgment debt, consequently, the defendant commenced bankruptcy proceedings against the plaintiff to claim the sum of RM3,173,032.20 as the outstanding balance. The plaintiff then obtained a stay of the creditors petition and filed an action against the defendant for the following declaratory relief: (a) a declaration that the bankruptcy proceedings were illegal and contravened ss 92 and 94 of the Contracts Act 1950 ('Act 136'); (b) a declaration that he was wholly discharged as guarantor; (c) alternatively, a declaration that he was discharged pro tanto to the extent his

rights were impaired; (d) a declaration of no liability for the outstanding balance of RM3.17m; and (e) damages, interest, and costs ('the plaintiff's suit'). The plaintiff argued that the defendant owed a duty to preserve the charged structures and equipment and the defendant breached such duty when the defendant failed to prevent the systematic removal of such structures and equipment via 'stripping activities' which occurred in 2017–2018. In response, the defendant filed the present application to strike out the plaintiff's statement of claim ('the defendant's application'), pursuant to O 18 r 19(1)(b), (c) and/or (d) of the Rules of Court 2012, and based on three principal grounds: res judicata, limitation under the Limitation Act 1953 ('Act 254') and abuse of process. The issues that arose in the defendant's application were in relation to: (i) the nature of the plaintiff's liability — guarantor versus primary obligor; (ii) the applicability of ss 92 and 94 of Act 136; (iii) whether plaintiff's suit barred by res judicata and issue estoppel; (iv) whether the plaintiff's suit was time-barred; and (v) whether plaintiff's suit was an abuse of process.

Held, allowing the defendant's application to strike out the plaintiff's statement of claim with costs:

(1) The court found that the plaintiff contracted as a guarantor with primary obligor status under the IJSG agreement. The distinction the plaintiff sought to draw between his role as 'guarantor' and as 'primary obligor' was artificial and unsupported by the contractual documentation. the IJSG agreement created a single legal relationship wherein the plaintiff assumed enhanced liability that precluded reliance on traditional surety protections. This finding was determinative of the plaintiff's claims under ss 92 and 94 of Act 136, as these provisions were designed to protect traditional sureties, not primary obligors who had contractually assumed direct liability (see paras 34–35).

(2) The court found that ss 92 and 94 of Act 136 were inapplicable to the plaintiff's circumstances for two independent reasons: (a) the plaintiff contracted as a primary obligor and was therefore not entitled to the statutory protections designed for traditional sureties; and (b) even if the plaintiff were a traditional surety, he had not established any breach of duty by the defendant that would trigger the statutory protections (see paras 45).

(3) The court found that the principles of res judicata and issue estoppel barred the plaintiff's current claims. The factual foundation of his claims was known to him for several years before the commencement of the present proceedings, and he had multiple opportunities to raise these issues in appropriate forums. The plaintiff's prolonged silence, followed by his tactical decision to acquiesce to bankruptcy proceedings before launching a collateral attack, constituted an abuse of process that could not be permitted (see paras 52–53).

(4) The plaintiff's statement of claim pleaded that the 'stripping activities' occurred in 2017–2018, resulting in the loss of the structures and fixtures that formed part of the security. The court found that any cause of action based on the defendant's alleged failure to preserve the secured assets would have accrued in 2017–2018 when the 'stripping activities' occurred. The plaintiff's suit, commenced more than six years later, was time-barred under s 6 of Act 254. The plaintiff could not escape this conclusion by attempting to re-characterise his claim as arising from the commencement of bankruptcy proceedings in 2024 (see paras 56 & 59).

(5) The court found that the present proceedings constituted an abuse of process for reasons that the plaintiff's prolonged acquiescence to enforcement proceedings despite knowledge of relevant facts. The abuse was in terms of the tactical timing of his challenge after allowing the defendant to incur substantial costs, the collateral attack on concluded proceedings where proper challenge mechanisms were available and the attempt to relitigate matters that could and should have been raised in earlier proceedings (see para 66).

(6) Even if the court were to find that the jurisdictional and procedural bars discussed above did not apply, the plaintiff's claims would still fail on their substantive merits. In this regard, the court found: (a) the plaintiff's case fundamentally depended on establishing that the defendant owed a duty to preserve the structures and fixtures that were allegedly lost through stripping activities, however, no such duty could be established on the facts or law; (b) even assuming a duty existed, the plaintiff had not established that any breach of that duty caused his alleged losses; and (c) the plaintiff could not establish that he suffered loss due to the defendant's conduct rather than his own actions and those of his related entities (see paras 67–68, 71 & 74).

(7) The plaintiff's claims, if successful, would establish dangerous precedents for the banking and finance industry. Requiring secured creditors to become active managers of secured assets would fundamentally alter commercial lending practices and likely increase the cost and reduce the availability of credit. Security interests were designed to provide proprietary protection to creditors, not to impose positive duties of asset management. The balance struck by the Legislature reflected careful consideration of the competing interests of creditors and sureties. Extending these protections to primary obligors would upset this balance and undermine the commercial certainty that these provisions were designed to create (see paras 75–76).

(8) The 'plain and obvious' test for striking out was clearly satisfied in the present case. The legal and factual deficiencies in the plaintiff's case were manifest and could not be cured by amendment or further evidence. This was precisely the type of case where striking out was appropriate — one

where prolonged litigation would serve no useful purpose and would only impose unnecessary costs and delay on the defendant and the judicial system. The interests of justice required that obviously unsustainable claims be disposed of summarily to allow parties and the courts to focus resources on genuine disputes that merited full adjudication (see paras 77–78).

[Bahasa Malaysia summary

Bank Pembangunan Malaysia Bhd ('defendan') telah memberikan kemudahan pembiayaan berjumlah RM63 juta kepada MHES Asia Sdn Bhd ('MASB') untuk tujuan pembiayaan kemudahan biojisim tenaga boleh diperbaharui. Kemudahan pembiayaan ini dijamin, antara lain, melalui jaminan yang diberikan oleh plaintif melalui 'Irrevocable Joint and Several Guarantee Agreement' bertarikh 28 November 2008 ('perjanjian IJSG'). Apabila MASB gagal membayar kemudahan pembiayaan tersebut, defendan memfailkan tindakan pada tahun 2016 terhadap plaintif sebagai penjamin. Pada akhir kes, penghakiman telah diberikan dengan memihak kepada defendan dan plaintif diperintahkan untuk membayar sejumlah RM3,777,520.58 (bersama faedah dan kos) kepada defendan ('penghakiman 2016 tersebut'). Berikutan penghakiman 2016 tersebut, defendan telah membuat beberapa percubaan untuk menjual hartanah yang dicagarkan melalui lelongan awam, yang semuanya gagal sehinggalah penjualan akhirnya berhasil pada Mac 2023. Walau bagaimanapun, dana yang dikumpul daripada penjualan hartanah yang dicagarkan tidak mencukupi untuk menjelaskan hutang penghakiman, akibatnya, defendan memulakan prosiding kebankrapan terhadap plaintif untuk menuntut jumlah RM3,173,032.20 sebagai baki tertunggak. Plaintif kemudian memperoleh penangguhan petisyen pemiutang dan memfailkan tindakan terhadap defendan untuk relif-relif deklarasi berikut: (a) pengisytiharan bahawa prosiding kebankrapan tersebut adalah tidak sah dan melanggar ss 92 dan 94 Akta Kontrak 1950 ('Akta 136'); (b) pengisytiharan bahawa dia dilepaskan sepenuhnya sebagai penjamin; (c) secara alternatif, pengisytiharan bahawa dia dilepaskan pro tanto setakat haknya terjejas; (d) pengisytiharan tiada liabiliti untuk baki tertunggak sebanyak RM3.17 juta; dan (e) ganti rugi, faedah dan kos ('saman plaintif'). Plaintif berhujah bahawa defendan mempunyai kewajipan untuk memelihara struktur dan peralatan yang dicagarkan dan defendan melanggar kewajipan tersebut apabila defendan gagal menghalang penyingkiran struktur dan peralatan tersebut secara sistematik melalui 'aktiviti pelucutan' yang berlaku pada tahun 2017–2018. Sebagai tindak balas, defendan memfailkan permohonan semasa untuk membatalkan pernyataan tuntutan plaintif ('permohonan defendan'), menurut A 18 k 19(1)(b), (c) dan/atau (d) Kaedah-Kaedah Mahkamah 2012, dan berdasarkan tiga alasan utama: res judicata, had masa di bawah Akta Had Masa 1953 ('Akta 254') dan penyalahgunaan proses mahkamah. Isu-isu yang timbul dalam permohonan defendan adalah berkaitan dengan: (i) sifat liabiliti plaintif — penjamin atau pun penanggung obligasi utama; (ii) keterpakaian ss

92 dan 94 Akta 136; (iii) sama ada saman plaintif dihalang oleh res judicata dan estoppel isu; (iv) sama ada saman plaintif dihalang oleh had masa; dan (v) sama ada saman plaintif merupakan satu penyalahgunaan proses mahkamah.

Diputuskan, membenarkan permohonan defendan untuk membatalkan pernyataan tuntutan plaintif dengan kos:

(1) Mahkamah mendapati bahawa plaintif mengikat kontrak sebagai penjamin dengan status penanggung obligasi utama di bawah perjanjian IJSG. Perbezaan yang cuba digariskan oleh plaintif antara peranannya sebagai 'penjamin' dan sebagai 'penanggung obligasi utama' adalah palsu dan tidak disokong oleh dokumentasi kontrak. Perjanjian IJSG tersebut mewujudkan satu hubungan undang-undang tunggal di mana plaintif menanggung liabiliti yang dipertingkatkan yang menghalang pergantungan pada perlindungan penjamin tradisional. Dapatan ini menentukan tuntutan plaintif di bawah ss 92 dan 94 Akta 136, kerana peruntukan-peruntukan ini direka untuk melindungi penjamin tradisional, bukan penanggung obligasi utama yang telah menanggung liabiliti langsung secara kontrak (lihat perenggan 34–35).

(2) Mahkamah mendapati bahawa ss 92 dan 94 Akta 136 tidak terpakai kepada keadaan plaintif atas dua sebab berasingan: (a) plaintif berkontrak sebagai penanggung obligasi utama dan oleh itu tidak berhak kepada perlindungan statutori yang direka untuk penjamin tradisional; dan (b) jika pun plaintif adalah penjamin tradisional, dia tidak membuktikan apa-apa pelanggaran kewajipan oleh defendan yang akan mencetuskan perlindungan statutori tersebut (lihat perenggan 45).

(3) Mahkamah mendapati bahawa prinsip res judicata dan estoppel isu menghalang tuntutan semasa plaintif. Asas fakta tuntutannya telah diketahui olehnya selama beberapa tahun sebelum permulaan prosiding semasa, dan dia mempunyai banyak peluang untuk membangkitkan isu-isu ini dalam forum yang sesuai. Kebisuan plaintif yang berpanjangan, diikuti dengan keputusan taktikalnya untuk bersetuju dengan prosiding kebankrapan sebelum melancarkan serangan sampingan, merupakan penyalahgunaan proses yang tidak boleh dibenarkan (lihat perenggan 52–53).

(4) Pernyataan tuntutan plaintif memplid bahawa 'aktiviti pelucutan' berlaku pada tahun 2017–2018, mengakibatkan kehilangan struktur dan lekapan yang membentuk sebahagian daripada cagaran tersebut. Mahkamah mendapati bahawa apa-apa tindakan berdasarkan dakwaan kegagalan defendan untuk memelihara aset bercagar akan terakru pada tahun 2017–2018 apabila 'aktiviti pelucutan' tersebut berlaku. Saman plaintif, yang bermula lebih enam tahun kemudian, telah dihalang oleh had masa di bawah s 6 Akta 254. Plaintif tidak boleh melepaskan diri daripada kesimpulan ini dengan cuba mencirikan semula tuntutannya

sebagai timbul daripada permulaan prosiding kebankrapan pada tahun 2024 (lihat perenggan 56 & 59).

(5) Mahkamah mendapati bahawa prosiding semasa merupakan penyalahgunaan proses kerana plaintif telah sentiasa bersetuju dengan prosiding penguatkuasaan walaupun mengetahui fakta-fakta yang berkaitan. Penyalahgunaan tersebut adalah dari segi masa taktikal cabarannya selepas membenarkan defendan menanggung kos yang besar, serangan sampingan ke atas prosiding yang telah selesai sedangkan mekanisme cabaran yang betul tersedia dan percubaan untuk membincangkan semula perkara-perkara yang boleh dan sepatutnya dibangkitkan dalam prosiding terdahulu (lihat perenggan 66).

(6) Jika pun mahkamah mendapati bahawa halangan bidang kuasa dan prosedur yang dibincangkan di atas tidak terpakai, tuntutan plaintif masih akan gagal berdasarkan merit substantifnya. Dalam hal ini, mahkamah mendapati: (a) kes plaintif pada asasnya bergantung pada penentuan bahawa defendan mempunyai kewajipan untuk memelihara struktur dan lekapan yang didakwa hilang melalui aktiviti pelucutan, walau bagaimanapun, tiada kewajipan sedemikian boleh dibuktikan berdasarkan fakta atau undang-undang; (b) walaupun dengan mengandaikan kewajipan tersebut wujud, plaintif tidak membuktikan bahawa apa-apa pelanggaran kewajipan tersebut menyebabkan kerugian yang didakwanya; dan (c) plaintif tidak dapat membuktikan bahawa dia mengalami kerugian disebabkan oleh tindakan defendan dan bukannya tindakannya sendiri dan entiti berkaitannya (lihat perenggan 67–68, 71 & 74).

(7) Tuntutan plaintif, jika berjaya, akan mewujudkan duluan berbahaya bagi industri perbankan dan kewangan. Mewajibkan pemiutang bercagar untuk menjadi pengurus aktif aset bercagar akan mengubah amalan pinjaman komersial secara asasnya dan berkemungkinan meningkatkan kos serta mengurangkan ketersediaan kredit. Kepentingan sekuriti direka bentuk untuk menyediakan perlindungan proprietari kepada pemiutang, bukan untuk mengenakan tugas positif pengurusan aset. Imbangan yang dicapai oleh badan perundangan mencerminkan pertimbangan yang teliti terhadap kepentingan bersaing pemiutang dan penjamin. Memperluas perlindungan ini kepada penanggung obligasi utama akan mengganggu keseimbangan ini dan menjejaskan kepastian komersial yang ingin diwujudkan di bawah peruntukan ini (lihat perenggan 75–76).

(8) Ujian 'plain and obvious' untuk pembatalan telah dipenuhi dengan jelas dalam kes semasa. Kekurangan undang-undang dan fakta dalam kes plaintif adalah nyata dan tidak dapat diatasi dengan pindaan atau keterangan lanjut. Ini sememangnya jenis kes di mana pembatalan adalah sesuai — kes di mana litigasi yang berpanjangan tidak akan

memberi apa-apa tujuan yang berguna dan hanya akan mengenakan kos dan kelewatan yang tidak perlu kepada defendan dan sistem kehakiman. Kepentingan keadilan menghendaki tuntutan yang jelas tidak mampan diselesaikan dengan segera untuk membolehkan pihak-pihak dan mahkamah menumpukan sumber kepada pertikaian tulen yang memerlukan penghakiman penuh (lihat perenggan 77–78).]

Cases referred to

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449, FC (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Bank Pembangunan Malaysia Bhd v Ketheeswaran a/l M Kanagaratnam [2022] 5 MLJ 393, CA (refd)
Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee [1997] SCD 54; [1997] 2 SLR(R) 59, CA (refd)
Hong Leong Bank Bhd v Percetakan Melati Sdn Bhd & Ors [2002] 4 MLJ 70, HC (refd)
Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal [2020] 4 MLJ 93, CA (refd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993, PC (refd)
Moschi v Lep Air Services Ltd [1973] AC 331, HL (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)
Tractors Malaysia Bhd v Charles Au Yong [1982] 1 MLJ 320, FC (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)
United Overseas Bank (M) Bhd v Tan Chong Whatt & Anor [2025] 3 MLJ 161, CA (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967)
Contracts Act 1950 ss 92, 94
Limitation Act 1953 s 6
Rules of Court 2012 O 18 r 19, 19(1), (1)(b), (1)(c), (1)(d), O 92 r 4

T Shudhar (with Ho Xue Ying) (Thangaraj & Assoc) for the plaintiff.
Oommen Koshy (with Nor Amilia Najiha) (Koshy Chambers) for the defendant.

Arziah Mohamed Apandi JC:

FACTUAL BACKGROUND

Jurisdiction and powers

[1] The power to strike out under O 18 r 19 of the Rules of Court 2012 ('the ROC 2012') is an exceptional remedy that must be exercised with great caution. As established in the seminal Federal Court decision of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (FC), this court must adopt a careful and meticulous approach before deciding to strike out a claim.

[2] This court derives its powers from those stipulated in O 92 r 4 of the ROC 2012. The jurisdiction to strike out pleadings is both inherent and statutory, designed to prevent abuse of process and ensure the efficient administration of justice.

The 'plain and obvious' test

[3] The striking out jurisdiction is only appropriate when the case is 'plain and obvious' and where the claim is 'obviously unsustainable'. This test was refined in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 (FC), where the Federal Court emphasised that the 'obviously unsustainable' test applies an objective standard requiring someone with appropriate expertise to perceive the deficiency.

[4] In *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 (CA), the term 'cause of action' was defined as comprising the entire set of facts giving rise to an enforceable claim — every fact which, if traversed, the plaintiff must prove to obtain judgment.

[5] This court may strike out claims requiring lengthy hearings if ultimately satisfied that no cause of action exists, as justice requires relieving defendants of obviously unsustainable claims. However, this court cannot conduct minute examination of documents or facts or decide on difficult legal questions requiring lengthy arguments. This court should not 'pull shutters down' on litigants without compelling justification.

Grounds for striking out

[6] The defendant's application is made under limbs (b), (c) and/or (d) of O 18 r 19(1) of the ROC 2012, specifically that the statement of claim:

(a) discloses no reasonable cause of action;

(b) is scandalous, frivolous or vexatious; and

(c) may otherwise constitute an abuse of the process of the court.

[7] The defendant applies to strike out based on three principal grounds: res judicata, limitation under the Limitation Act 1953 and abuse of process.

FACTUAL BACKGROUND

The financing arrangement

[8] The genesis of this dispute lies in a substantial financing facility granted by the defendant bank to MHES Asia Sdn Bhd ('MASB') on 28 November 2008. The facility amounted to RM63m, intended to finance a renewable energy biomass facility utilising palm oil waste feedstock.

[9] The facility was secured by comprehensive security arrangements including a debenture over MASB's structures, equipment, and assets, a separate charge over land owned by MZ Jitu Sdn Bhd ('MZ Jitu') in Negeri Sembilan and personal guarantees from the plaintiff and another individual as directors of MASB. The plaintiff executed an irrevocable joint and several guarantee agreement ('IJSG agreement') dated 28 November 2008, whereby he undertook to guarantee MASB's obligations to the defendant.

The initial valuation and development

[10] The facility initially held substantial promise. In 2011, the complete facility was valued at RM100m as a 'Small Renewable Energy Power Plant' including land, buildings, structures and sophisticated equipment, with a forced sale value assessed at RM70m.

[11] The commercial viability of the project appeared strong when, in 2012, the Federal Land Development Authority ('FELDA') proposed investing RM66m for a 60% stake in MASB, effectively valuing the company at RM110m. This external validation seemed to confirm the substantial value of the secured assets. However, by 2015, the proposed FELDA investment had failed to materialise. The breakdown of these negotiations proved to be a watershed moment, leading MASB shareholders to cease operations to avoid further financial commitments and mounting losses.

The decline and stripping activities

[12] Following the collapse of the FELDA deal, the trajectory of the secured assets underwent a dramatic change. Subsequent valuations began excluding the valuable plant and machinery that had previously formed the core of the facility's worth.

[13] A critical development occurred in 2016 when a valuation report assessed only the bare land at RM11.4m, explicitly disregarding the substantial value of the equipment and infrastructure that had justified the original financing. The most significant deterioration occurred during 2017–2018 through 'stripping activities' which resulted in the removal of all structures, equipment, and valuable fixtures from the site, reducing what had been a RM100m industrial facility to bare agricultural land. Subsequent valuations starkly illustrate the impact of these stripping activities: the 2018 valuation dropped precipitously to RM3.5m, and the land was ultimately sold in March 2023 for merely RM1.79m, representing a catastrophic decline to just 1.79% of the original facility valuation.

Legal proceedings and enforcement

[14] Faced with MASB's default, the defendant commenced legal proceedings in 2016 against the guarantors. On 4 April 2017, the defendant obtained judgment in Civil Suit No WA-22NCVC-3168–09 of 2016 ('2016 civil suit judgment') against the plaintiff in the sum of RM3,777,520.58, together with interest and costs.

[15] The 2016 civil suit judgment was obtained specifically against the plaintiff in his capacity as guarantor. This distinction becomes crucial to the present proceedings, as the plaintiff contends that the defendant elected to pursue him solely in this capacity.

[16] Following the 2016 civil suit judgment, numerous attempts were made to sell the charged property through public auction, all of which failed until the eventual sale in March 2023. MASB was dissolved in 2019, leaving the guarantors as the remaining entities of recovery for the defendant.

[17] After the 2023 sale realised insufficient funds to satisfy the judgment debt, a shortfall remained. On 12 March 2024, the defendant commenced bankruptcy proceedings against the plaintiff under Case No BA-29NCCC-756–03 of 2024, claiming RM3,173,032.20 as the outstanding balance.

PROCEDURAL HISTORY OF CURRENT PROCEEDINGS

Bankruptcy proceedings timeline

[18] The sequence of events leading to the present application reveals the plaintiff's evolving response to the defendant's enforcement efforts:

12 March 2024	Defendant filed bankruptcy notice against the plaintiff
16 April 2024	Defendant obtained leave to commence bankruptcy proceedings (first leave application)
27 June 2024	Defendant filed creditor's petition (second leave application)
1 October 2024	Plaintiff applied to set aside the creditor's petition
15 November 2024	Plaintiff filed the present action
22 November 2024	Plaintiff applied for stay of creditor's petition pending outcome of this action
10 February 2025	Bankruptcy court dismissed setting aside application but granted stay

Significance of timing

[19] The time sequence is significant for multiple reasons. First, it demonstrates the plaintiff's initial acquiescence to the bankruptcy proceedings — no objection was raised to either the first or second leave applications. Second, it establishes the limitation periods relevant to various potential causes of action. Third, it illustrates the plaintiff's apparent change of strategy only after the bankruptcy proceedings had substantially progressed.

THE PARTIES' RESPECTIVE CASES

The plaintiffs claims

[20] The plaintiff's case, as pleaded in the statement of claim, centres on three principal contentions:

(a) election and merger: The plaintiff argues that he was sued in the 2016 proceedings solely in his capacity as guarantor, and that the defendant cannot now seek to enforce against him in any other capacity due to the doctrines of election and merger;

(b) breach of chargee duties: The plaintiff contends that the defendant breached its duties as chargee by failing to safeguard, maintain, and preserve the charged structures and equipment, specifically by failing to prevent the systematic removal that rendered the valuable assets worthless; and

(c) statutory discharge: The plaintiff asserts that under ss 92 and 94 of the Contracts Act 1950, he should be discharged from his guarantee obligations because the defendant's misconduct impaired his rights as

guarantor and caused the loss of security.

[21] The plaintiff seeks the following declaratory relief:

(a) a declaration that the bankruptcy proceedings are illegal and contravene ss 92 and 94 of the CA 1950;

(b) a declaration that he is wholly discharged as guarantor;

(c) alternatively, a declaration that he is discharged pro tanto to the extent his rights were impaired;

(d) a declaration of no liability for the outstanding balance of RM3.17m; and

(e) damages, interest, and costs.

The defendant's response

[22] The defendant's case in response and in support of the striking out application rests on several pillars:

(a) a guarantor but contracted as both guarantor and primary obligor under the guarantee agreement, making him primarily liable regardless of the principal borrower's status;

(b) no breach of duties: the defendant contends that there was no breach of any chargee duties, as it was never under an obligation to take possession of or preserve the structures and equipment, which remained under the control of the borrower and related entities;

(c) procedural bars: The defendant maintains that the plaintiff's claims are barred by res judicata, limitation and constitute an abuse of process, particularly given his failure to raise these issues during earlier proceedings; and

(d) statutory inapplicability: The defendant argues that the statutory provisions are inapplicable to primary obligors, and that even if applicable, the defendant's conduct does not fall within the statutory prohibitions.

LEGAL ANALYSIS

Issue 1: The nature of the plaintiff's liability-guarantor versus primary obligor

The contractual framework

[23] The crux of this case turns on the proper characterisation of the plaintiffs role under the IJSG agreement. This is not merely a question of

nomenclature but goes to the very heart of the legal relationship and the applicable statutory protections. The IJSG agreement, executed on 28 November 2008, contains explicit language defining the plaintiffs obligations. Clause 1 of the agreement states:

> To pay and satisfy you on demand as primary obligor(s) and not merely as sureties the punctual payment by the Customer of the Sale Price and all sum of money which hereafter may from time to time be owing or remain due and unpaid to you from the Customer together with all the charges and profit margin thereon ...

[24] This language is unambiguous and deliberate. The parties specifically contracted that the plaintiff would act 'as primary obligor(s) and not merely as sureties'. This distinction is legally significant and cannot be dismissed as mere drafting convention. Clause 4(a) of the IJSG agreement further reinforces this characterisation by providing that the plaintiffs liability shall not be affected nor shall the agreement be discharged or diminished by reason of:

> any present or future guarantee, indemnity, charge, pledge, lien or other security or right or remedy held or available to you being or becoming wholly or in part void, voidable or unenforceable on any ground whatsoever ...

Authority on primary obligor status

[25] The legal significance of contracting as a 'primary obligor' has been considered in several Malaysian authorities. In *Bank Pembangunan Malaysia Bhd v Ketheeswaran a/l M Kanagaratnam* [2022] 5 MLJ 393 (CA), the Court of Appeal addressed a materially similar situation involving the same defendant bank and a guarantee agreement containing identical language.

[26] In *Ketheeswaran,* it was held that when a guarantor contracts as a 'principal obligor/debtor' they assume primary liability regardless of the principal borrower's status. The court emphasised that such contractual arrangements establish direct obligations that are not dependent on the borrower's default in the usual sense of suretyship. The earlier Federal Court case of *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449 (FC) was highlighted in *Ketheeswaran,* where the Federal Court declared that a principal obligor is primarily liable for the principal borrower's debt to the lender. This liability is neither dependent nor secondary to the liability of the principal borrower.

[27] The Privy Council's decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 (PC) provides additional guidance on the interpretation of guarantee agreements. The Privy Council emphasised that courts must give effect to the clear intention of the parties as expressed in their agreement,

particularly where sophisticated commercial parties have used precise legal terminology.

The plaintiff's arguments on dual capacity

[28] The plaintiff argues that there exists a meaningful distinction between his roles as 'guarantor' and as 'primary obligor' and that the 2016 civil suit judgment was obtained against him solely in his capacity as guarantor. This argument, while ingenious, fundamentally misunderstands the legal effect of the IJSG agreement.

[29] The plaintiffs contention that he possesses 'dual capacity' lacks legal foundation. The IJSG agreement establishes a single legal relationship in which the plaintiff assumes the obligations of a guarantor, with the enhanced liability of a primary obligor. These are not separate capacities but different aspects of a unified obligation.

[30] The language 'as primary obligor(s) and not merely as sureties' was specifically chosen to eliminate any possibility of claiming traditional surety protections while maintaining the guarantee framework for the underlying transaction. This drafting achieves the commercial objective of providing the lender with recourse against a party who cannot claim discharge based on the principal debtor's circumstances or the creditor's handling of security.

Application of the merger doctrine

[31] The plaintiff relies heavily on the doctrine of merger, citing *Hong Leong Bank Bhd v Percetakan Melati Sdn Bhd & Ors* [2002] 4 MLJ 70 (HC). While the merger doctrine is well-established, its application to the present facts does not assist the plaintiff. The High Court there held that whatever is stated in pleadings merges into the judgment, and causes of action not reflected in the judgment cease to exist. However, this principle operates to extinguish separate causes of action, not to transform the nature of the liability that forms the basis of the judgment.

[32] The 2016 civil suit judgment was obtained against the plaintiff based on his obligations under the IJSG agreement. The fact that the judgment refers to him as 'guarantor' does not alter the contractual basis of that liability, which included his express agreement to act as primary obligor.

[33] Moreover, the merger doctrine cannot be used to escape contractual obligations that formed the foundation of the original claim. The plaintiffs

liability as primary obligor was the very basis upon which the 2016 civil suit judgment was obtained, even if that judgment used the shorthand description of 'guarantor'.

The court's finding on primary obligor status

[34] Having carefully considered the contractual jargon, the applicable authorities and the parties' arguments, this court finds that the plaintiff contracted as a guarantor with primary obligor status under the IJSG agreement.

[35] The distinction the plaintiff seeks to draw between his role as 'guarantor' and as 'primary obligor' is artificial and unsupported by the contractual documentation. The IJSG agreement creates a single legal relationship wherein the plaintiff assumes enhanced liability that precludes reliance on traditional surety protections. This finding is determinative of the plaintiff's claims under ss 92 and 94 of the CA 1950, as these provisions are designed to protect traditional sureties, not primary obligors who have contractually assumed direct liability.

Issue 2: Applicability of ss 92 and 94 of the CA 1950

Statutory framework

[36] Sections 92 and 94 of the CA 1950 provide specific protections for sureties in defined circumstances:

(a) s 92 — discharge of surety by creditor's act or omission impairing surety's eventual remedy:

> If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

(b) s 94 — surety's right to benefit of creditor's securities:

> A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

Legislative intent and scope

[37] These provisions reflect the Legislature's recognition that traditional sureties enter into guarantee arrangements on the understanding that they will

A have recourse against the principal debtor and benefit from the securities held by the creditor. The protections are designed to preserve the surety's position and prevent creditor conduct that would unfairly prejudice the surety's rights. However, the statutory protections are explicitly limited to 'sureties' in the traditional sense. The legislation does not extend these protections to primary B obligors who have contractually assumed direct liability to the creditor.

[38] A recent decision of the Court of Appeal in *United Overseas Bank (M) Bhd v Tan Chong Whatt & Anor* [2025] 3 MLJ 161 (CA) unanimously held C that the guarantors were not merely sureties but were contractually liable as principal debtors. The Court of Appeal further held that:

> The guarantors were not protected under s 8(2A) of the Bankruptcy Act 1967 as they did not fall within the meaning of 'debtor' as envisaged under the law. They also could not avail of ss 92 and/or 94 of the Contracts Act 1950 which were D intended to protect only sureties and not sureties who had also assumed responsibility as principal debtors (see paras 28–36).

[39] The policy rationale for this limitation is clear: parties who assume primary obligor status do so with full knowledge that they will not benefit from E the protective provisions applicable to traditional sureties. This trade-off forms part of the consideration for the enhanced commercial arrangements typically associated with primary obligor guarantees.

F **[40]** The courts have consistently held that ss 92 and 94 of the CA 1950 protections are not available to primary obligors. In *Ketheeswaran* involving materially identical contractual provisions, the High Court specifically held that a guarantor who contracts as primary obligor cannot rely on ss 92 and 94 of the CA 1950.

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[41] The Singapore Court of Appeal's decision in *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] SCD 54; [1997] 2 SLR(R) 59 provides persuasive authority on the interpretation of similar statutory provisions. The court held that parties who assume primary obligor status must be held to their H contractual bargain and cannot subsequently claim the protection of surety-specific legislation.

[42] The House of Lord's approach in *Moschi v Lep Air Services Ltd* [1973] AC 331 also supports the principle that primary obligors are not entitled to I surety protections, emphasising that the contractual characterisation of the obligation determines the available remedies and defences.

Application to present facts

[43] Given this court's finding that the plaintiff contracted as a primary obligor under the IJSG agreement, ss 92 and 94 of the CA 1950 are simply inapplicable to his situation. Even if the court were to accept arguendo that the plaintiff was a traditional surety, his claims would still fail on their merits. The plaintiff has not established that the defendant had any duty to take possession of or preserve the structures and fixtures that were allegedly lost through 'stripping activities'.

[44] The debenture created security over MASB's assets, but did not impose positive obligations on the defendant to assume physical control or management of those assets. The plaintiff's argument effectively seeks to impose a duty of care that finds no basis in the security documentation or applicable law.

The court's finding on statutory protections

[45] This court finds that ss 92 and 94 of the CA 1950 are inapplicable to the plaintiffs circumstances for two independent reasons:

(a) the plaintiff contracted as a primary obligor and is therefore not entitled to the statutory protections designed for traditional sureties; and

(b) even if the plaintiff were a traditional surety, he has not established any breach of duty by the defendant that would trigger the statutory protections.

Issue 3: Res judicata and issue estoppel

Legal principles

[46] The doctrine of res judicata serves the crucial function of preventing the re-litigation of matters that have been conclusively determined. The principle encompasses both cause of action estoppel and issue estoppel, with the latter being particularly relevant to the present circumstances.

[47] In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 (FC), the Federal Court established that res judicata applies not only to matters actually decided but also to those which, 'exercising reasonable diligence, might have been brought forward' in the earlier proceedings. The rationale for this expansive approach is the promotion of finality in litigation and the prevention of parties from engaging in tactical manipulation of the judicial process by withholding arguments or evidence for use in subsequent proceedings.

Application to the stripping activities

[48] The factual foundation of the plaintiff's current claim — the alleged 'stripping activities' that occurred in 2017–2018 was known to the plaintiff well before the commencement of the present proceedings. The plaintiff's own pleadings acknowledge that he became aware of the condition of the land during a summons for direction hearing on 29 August 2018.

[49] Despite this knowledge, the plaintiff failed to raise any objection or challenge when the defendant sought leave to enforce the 2016 civil suit judgment in 2023. He similarly remained silent when the defendant applied for leave to commence bankruptcy proceedings in April 2024. The plaintiff's conduct demonstrates a clear pattern of acquiescence to the defendant's enforcement efforts, despite having full knowledge of the factual circumstances he now seeks to rely upon. This conduct constitutes acceptance of the security's loss and precludes him from subsequently challenging the enforcement process.

The bankruptcy leave applications

[50] The plaintiff's failure to object to the bankruptcy leave applications is particularly significant. These applications provided a proper forum for raising challenges to the underlying debt or the appropriateness of bankruptcy proceedings.

[51] The Bankruptcy Act 1967 and the applicable procedural rules provide specific mechanisms for debtors to challenge bankruptcy proceedings on grounds including disputes over the underlying debt, procedural irregularities, or substantive defences. By failing to utilise these mechanisms and instead acquiescing to the leave applications, the plaintiff has waived his right to raise the challenges that form the basis of the present proceedings.

The court's finding on res judicata

[52] This court finds that the principles of res judicata and issue estoppel bar the plaintiffs current claims. The factual foundation of his claims was known to him for several years before the commencement of these proceedings, and he had multiple opportunities to raise these issues in appropriate forums.

[53] The plaintiff's prolonged silence, followed by his tactical decision to acquiesce to bankruptcy proceedings before launching a collateral attack, constitutes an abuse of process that cannot be permitted.

Issue 4: Limitation

Statutory framework

[54] Section 6 of the Limitation Act 1953 ('s 6 of the LA 1953') provides that actions founded on contract must be brought within six years from the date on which the cause of action accrued. The determination of when a cause of action accrues is a question of law that depends on the specific nature of the claim.

[55] In contract actions, the cause of action typically accrues when the breach occurs, regardless of when the plaintiff becomes aware of the breach or its consequences. This principle promotes certainty and prevents the indefinite extension of limitation periods.

The plaintiff's pleaded case

[56] The plaintiffs statement of claim pleads that the 'stripping activities' occurred in 2017–2018, resulting in the loss of the structures and fixtures that formed part of the security. If the defendant owed any duty to preserve these assets, any breach of that duty would have occurred when the stripping activities took place.

[57] The plaintiff was found to be aware of the condition of the land by August 2018, when the matter was discussed during court proceedings. Any cause of action for breach of the defendant's alleged duties would have accrued at that time. This instant suit was not commenced until 15 November 2024, more than six years after the plaintiff's cause of action allegedly accrued. Prima facie, the action is time-barred under s 6 of the LA 1953.

[58] The plaintiff argues that his cause of action only arose when the bankruptcy proceedings commenced in March 2024, as this was when the alleged contravention of ss 92 and 94 of the CA 1950 crystallised. With respect, this argument cannot hold water. First, it assumes that ss 92 and 94 of the CA 1950 are applicable to the plaintiffs circumstances, which this court has found not to be the case. Second, it seeks to re-characterise a claim for breach of duty (which would have accrued in 2018) as a claim for wrongful commencement of proceedings (which would accrue in 2024). Such re-characterisation cannot circumvent the limitation period applicable to the underlying breach. Third, it ignores the fact that the defendant's right to commence bankruptcy proceedings flowed directly from the 2016 civil suit judgment, which remained valid and enforceable throughout the relevant period.

The court's finding on limitation

[59] This court finds that any cause of action based on the defendant's alleged failure to preserve the secured assets would have accrued in 2017–2018

when the 'stripping activities' occurred. This instant suit, commenced more than six years later, is time-barred under s 6 of the LA 1953. The plaintiff cannot escape this conclusion by attempting to re-characterise his claim as arising from the commencement of bankruptcy proceedings in 2024.

Issue 5: Abuse of process

Legal principles

[60] The inherent jurisdiction of the court to prevent abuse of process is well-established and serves to maintain the integrity of the judicial system. In *Tractors Malaysia Bhd v Charles Au Yong* [1982] 1 MLJ 320, the Federal Court emphasised that allowing collateral attacks on concluded proceedings after prolonged acquiescence constitutes abuse of process.

[61] The Court of Appeal's decision in *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal* [2020] 4 MLJ 93 established that while illegality can be raised at any stage of proceedings, this principle must be balanced against the need to prevent tactical manipulation of the judicial process.

The plaintiffs conduct

[62] The plaintiff's conduct throughout the relevant period demonstrates a pattern that, viewed objectively, constitutes abuse of process:

(a) *2018*: Became aware of the stripping activities but took no action;

(b) *2023*: Failed to object to leave application to enforce 2016 judgment;

(c) *April 2024*: Failed to object to first bankruptcy leave application;

(d) *June 2024*: Failed to object to second bankruptcy leave application;

(e) *October 2024*: First raised objections in setting aside application; and

(f) *November 2024*: Commenced present proceedings.

[63] This pattern reveals a deliberate strategy of allowing the defendant to incur costs and invest time in enforcement proceedings before launching a fundamental challenge to the underlying liability. Such conduct is inconsistent with the principles of fair dealing and good faith that underpin the administration of justice. Parties cannot remain silent while proceedings advance and then seek to invalidate those proceedings at a time of their choosing.

Collateral attack on concluded proceedings

[64] The present action essentially constitutes a collateral attack on the 2016 civil suit judgment and the subsequent enforcement proceedings. While the plaintiff frames his claim as a challenge to the bankruptcy proceedings, the substance of his argument requires the court to find that the underlying judgment should not be enforced. Such collateral attacks are generally impermissible, particularly where the attacking party had opportunities to raise the relevant issues in the original proceedings or subsequent enforcement applications.

[65] The proper forum for challenging the validity of bankruptcy proceedings is the bankruptcy court itself, through the mechanisms provided by the Bankruptcy Act 1967. The plaintiffs decision to commence separate proceedings in this court, after acquiescing to the bankruptcy applications, demonstrates forum shopping that cannot be permitted.

The court's finding on abuse of process

[66] This court finds that the present proceedings constitute an abuse of process for reasons that the plaintiff's prolonged acquiescence to enforcement proceedings despite knowledge of relevant facts. The abuse was in terms of the tactical timing of his challenge after allowing the defendant to incur substantial costs, the collateral attack on concluded proceedings where proper challenge mechanisms were available and the attempt to relitigate matters that could and should have been raised in earlier proceedings.

ALTERNATIVE ANALYSIS

The merits of the plaintiffs claims

[67] Even if this court were to find that the jurisdictional and procedural bars discussed above did not apply, the plaintiffs claims would still fail on their substantive merits.

Duty of care arguments

[68] The plaintiffs case fundamentally depends on establishing that the defendant owed a duty to preserve the structures and fixtures that were allegedly lost through stripping activities. However, no such duty can be established on the facts or law.

[69] The debenture created security interests over MASB's assets but did not impose positive obligations on the defendant to assume physical possession or

management of those assets. Security interests are proprietary rights that may be enforced when appropriate, but they do not automatically create duties of care toward guarantors.

[70] The plaintiffs argument would effectively require banks to become active managers of secured assets in all circumstances, regardless of whether the borrower remains operational and in possession. Such a requirement would fundamentally alter the nature of security relationships and impose unreasonable burdens on lenders.

Causation issues

[71] Even assuming a duty existed, the plaintiff has not established that any breach of that duty caused his alleged losses. The dramatic decline in value from RM100m to RM1.79m reflects multiple factors, including the market conditions in the renewable energy sector, the failure of the FELDA investment negotiations, MASB's cessation of operations coupled with the general economic factors affecting industrial property values.

[72] The plaintiff cannot simply point to the end result and assume that different conduct by the defendant would have preserved the original valuation. Commercial enterprises fail for numerous reasons, and asset values fluctuate based on market forces beyond any secured creditor's control.

The plaintiffs own conduct

[73] The plaintiff was not merely a passive guarantor but was actively involved in MASB as a director and shareholder. He was also connected to MZ Jitu, which owned the land on which the structures were erected. The plaintiff's intimate involvement in the relevant entities means that he cannot claim to have been an innocent bystander to the stripping activities. His own conduct and that of the entities he was associated with contributed to the deterioration of the secured assets.

[74] In these circumstances, the plaintiff cannot establish that he suffered loss due to the defendant's conduct rather than his own actions and those of his related entities.

Proportionality and public policy

[75] The plaintiff's claims, if successful, would establish dangerous precedents for the banking and finance industry. Requiring secured creditors to become active managers of secured assets would fundamentally alter commercial lending practices and likely increase the cost and reduce the

availability of credit. Security interests are designed to provide proprietary protection to creditors, not to impose positive duties of asset management.

[76] The balance struck by the Legislature reflects careful consideration of the competing interests of creditors and sureties. Extending these protections to primary obligors would upset this balance and undermine the commercial certainty that these provisions were designed to create.

CONCLUSION AND ORDERS

[77] The 'plain and obvious' test for striking out is clearly satisfied in this case. The legal and factual deficiencies in the plaintiff's case are manifest and cannot be cured by amendment or further evidence.

[78] This is precisely the type of case where striking out is appropriate — one where prolonged litigation would serve no useful purpose and would only impose unnecessary costs and delay on the defendant and the judicial system. The interests of justice require that obviously unsustainable claims be disposed of summarily to allow parties and the courts to focus resources on genuine disputes that merit full adjudication.

[79] For the foregoing reasons, this court allows the defendant's application to strike out where the plaintiff's statement of claim is struck out with costs.

Defendant's application to strike out plaintiff's statement of claim allowed with costs.

Reported by Dzulqarnain Ab Fatar